

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1935.

No. 6400

668

J. T. DINGER, RECEIVER OF THE INTERNATIONAL
EXCHANGE BANK, A CORPORATION, PLAINTIFF
IN ERROR,

vs.

DR. SALVATORE FLORIA.

LIBRARY

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

FILED JANUARY 18, 1935.

PRINTED MARCH 8, 1935.

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1935.

No. 6400

J. T. DINGER, RECEIVER OF THE INTERNATIONAL
EXCHANGE BANK, A CORPORATION, PLAINTIFF
IN ERROR,

vs.

DR. SALVATORE FLORIA, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original	Print
Caption	1	1
Declaration	2	2
Particulars of demand	9	6
Defendant's plea	12	8
Joinder of issue	14A	10
Assignment of errors	15	10
Presentation of bill of exceptions	17	11
Bill of exceptions	19	12
Designation of record	28	20
Writ of error	29	21

United States Court of Appeals for the District of Columbia

No. 6400.

J. T. DINGER, Receiver of the International Exchange
Bank, a Corporation, Plaintiff in Error,

vs.

DR. SALVATORE FLORIA.

1 Municipal Court of the District of Columbia.

A-10,730.

J. T. DINGER, Receiver of the International Exchange
Bank, a Corporation, Plaintiff,

vs.

DR. SALVATORE FLORIA, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

2 In the Municipal Court of the District of Columbia.

No. A-10,730.

J. T. DINGER, Receiver of the International Exchange Bank, a Corporation, Fifth and H Streets N. W., Washington, D. C., Plaintiff,

v.

D8. SALVATORE FLORIA, 943 Massachusetts Avenue, Washington, D. C., Defendant.

Declaration.

Filed August 31, 1934.

Now comes the plaintiff, J. T. Dinger, Receiver of the International Exchange Bank, located in the City of Washington, District of Columbia, and represents unto the court as follows: That the said J. T. Dinger was appointed Receiver of the International Exchange Bank by the Comptroller of the Currency, Treasury Department; that as the representative of said bank and the stockholders and creditors thereof, he sues the defendant, Dr. Salvatore Floria, a resident of the City of Washington, District of Columbia, for that:

The International Exchange Bank is a banking corporation organized under the laws of the State of Arizona, and was duly incorporated on the 30th day of June, 1921, and the Articles of Incorporation empowered the Board of Directors to establish offices outside the State of Arizona and provide that at these offices business may be transacted and meetings of the stockholders and of the Board of Directors may be held. The Board of Directors thereupon at its first meeting on July 8, 1921, duly established offices at Fifth and H Streets, Northwest, in
3 the City of Washington, District of Columbia, and said corporation soon thereafter on, to wit: August 1, 1921, opened the said offices in Washington, D. C., and thereafter continued to maintain a banking institution at said address in the City of Washington, District of Columbia, where deposits and savings were received, and thereby became subject to the jurisdiction of the Comptroller of the Currency, when in his opinion it became

necessary, to take possession of said bank for the reasons and in the manner and to the same extent as are provided in laws of the United States with respect to national banks; that said company did not at any time maintain a banking institution or do a banking business outside of the District of Columbia. On July 14, 1932, the Comptroller of the Currency, acting under the authority vested in him by law, determined that said bank was insolvent and unable to pay its legal debts and determined it to be necessary to take possession of said bank, and did take possession thereof, and on July 14, 1932, said Comptroller of the Currency appointed W. H. Blanz Receiver of the bank, and thereafter on July 30, 1932, appointed J. T. Dinger Receiver, plaintiff herein, to succeed the said W. H. Blanz, and thereupon J. T. Dinger duly qualified and is now acting as Receiver thereof. On July 14, 1932, the said International Exchange Bank had a paid-up capital of One Hundred Sixteen Thousand Eight Hundred Thirty Dollars (\$116,830.00), consisting of 11,683 shares of a par value of Ten Dollars (\$10.00) each; on July 14, 1932, the said Dr. Salvatore Floria owned and held one hundred (100) shares of the capital stock of the said bank; that this action is brought by the plaintiff to recover of the defendant payment of an assessment against the defendant as

4 the owner and holder of one hundred (100) shares of capital stock of said bank levied as hereinafter set forth on account of the liability for the debts of said bank imposed upon the shareholders thereof as hereinafter recited; that Article 14, Section 11 of the Constitution of Arizona adopted December 9, 1910, provides:

“The shareholder, or shareholders, of every banking or insurance corporation or association, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements, of such corporation or association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares of stock”;

that the Revised Statutes of Arizona, 1928, Chapter VIII, Banks and Banking, paragraph 227, provide:

“The stockholders of every bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such

corporation or association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares of stock.

“In case of the dissolution or liquidation of any bank, the constitutional and statutory liability of the stockholders must be enforced for the benefit of the creditors of such bank by the superintendent of banks or by any receiver.

“The action to enforce such liability shall be commenced within three (3) years after the closing of such bank, and may be commenced immediately upon closing of the bank if, in the judgment of the superintendent or receiver, the assets of such bank are insufficient to meet its liabilities”; that Article IX of the Articles of Incorporation of the International Exchange Bank provides:

“The private property of the stockholders of the corporation shall be forever exempt from liability for corporate debts of any kind, except that each stockholder shall be severally and individually liable to the creditors of the corporation for an amount equal to and in addition to the amount of stock held by him for all debts and contracts made by the corporation.”

5 that on October 18, 1932, the Comptroller of the Currency determined that in order to pay the debts of said bank, it was necessary to enforce the individual liability of the shareholders therefor, and made an assessment and requisition upon the shareholders of the said International Exchange Bank for One Hundred Sixteen Thousand Eight Hundred Thirty Dollars (\$116,830.00) to be paid by them on or before the 25th day of November, 1932, that amount constituting an assessment of one hundred per cent (100%) of the par value of the shares of the stock of the said bank; and at the same time the said Comptroller of the Currency made demand upon each and every one of the shareholders for the payment of a sum equal to the par value of each and every share of the capital stock of the said corporation held or owned by them, respectively, at the time of the bank's failure and directed this plaintiff as the Receiver of said bank to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders, copy of the order of assessment being attached hereto and marked “Exhibit A”; that the assessment levied on the defendant,

Dr. Salvatore Floria, as the holder and owner of one hundred (100) shares of the capital stock of said corporation amounts to One Thousand Dollars (\$1,000.00) which became due and payable on November 25, 1932, but the same has not, nor has any part thereof, been paid although payment has been demanded.

Wherefore the plaintiff brings this suit and claims of the defendant, Dr. Salvatore Floria, the sum of One Thousand Dollars (\$1,000.00), together with interest thereon at
6 six per cent (6%) per annum from November 25, 1932, and costs of this suit.

SANDERS, CHILDS, BOBB & WESCOTT,
By THOS. S. MARKEY,

Attorneys for J. T. Dinger, Receiver International Exchange Bank, 1032 Shoreham Building, Washington, D. C.

7

“EXHIBIT A.”

Assessment Upon Shareholders.

Treasury Department,
Office of the Comptroller of the Currency,
Washington, October 18, 1932.

In the Matter of International Exchange Bank, Washington, District of Columbia.

To all whom it may concern:

Whereas, it appears to my satisfaction that in order to pay the debts of the “International Exchange Bank,” a corporation doing business in the District of Columbia, now in Receivership, it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by law.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said “International Exchange Bank” for One Hundred Sixteen Thousand Eight Hundred Thirty (\$116,830.00) dollars, to be paid by them on or before the twenty-fifth day of November, 1932, and I hereby make demand upon each and every one of them for the par value of each and every share of the capital stock of said corporation held or owned by them, respectively, at the time of its failure; and I hereby direct Jean T. Dinger,

the Receiver heretofore appointed, to take all necessary
proceedings, by suit or otherwise to enforce to that
8 extent the said individual liability of the said share-
holders.

In witness whereof I have hereto set my hand and caused
my seal of office to be affixed to these present-, at the City of
Washington, in the District of Columbia, this eighteenth
day of October, A. D. 1932.

[Seal of Comptroller of the Currency.]

F. G. AWALT,
Acting Comptroller of the Currency.

9 In the Municipal Court of the District of Columbia.

No. —

J. T. DINGER, Receiver of the International Exchange Bank,
a Corporation, Fifth and H Streets, N. W., Plaintiff,

v.

DR. SALVATORE FLORIA, 943 Massachusetts Avenue, N. W.,
Washington, D. C., Defendant.

Particulars of Demand.

To: Amount due by the defendant to the plaintiff, as
follows:

Assessment of 100% on one hundred shares of ten dollar par value stock of the International Exchange Bank	\$1,000.00
Interest thereon at 6 per cent per annum from November 25, 1932, until paid.....	
Costs of this suit.....	

Total	\$
-------------	----

J. T. DINGER,
*Receiver of the International Exchange Bank,
Fifth and H Streets, N. W., Washington, D. C.*

SANDERS, CHILDS, BOBB & WESCOTT,
By THOS. S. MARKEY,
*Attorneys for J. T. Dinger, Receiver Inter-
national Exchange Bank, 1032 Shoreham
Building, Washington, D. C.*

10 In the Municipal Court of the District of Columbia.

No. —

J. T. DINGER, Receiver of the International Exchange Bank,
a Corporation, Fifth and H Streets, N. W., Washington,
D. C., Plaintiff,

v.

DR. SALVATORE FLORIA, 943 Massachusetts Avenue, N. W.,
Washington, D. C., Defendant.

Affidavit of Merit.

J. T. Dinger, Receiver of the International Exchange Bank, being first duly sworn on oath, deposes and says that he is the plaintiff in the above entitled cause and has personal knowledge of the matters and things therein stated; that he has a good cause of action against Dr. Salvatore Floria, the person named as defendant in the said cause of action, being as follows:

That the defendant, Dr. Salvatore Floria, was the owner and holder at the time of the failure of the International Exchange Bank on July 14, 1932, of one hundred (100) shares of the capital stock of said bank; that the Comptroller of the Currency, acting under and by virtue of the authority vested in him by law, made an assessment and requisition upon the shareholders of said bank, to be paid on or before the 25th day of November, 1932, and made a demand upon each shareholder for the par value, namely, Ten Dollars (\$10.00) per share, of each and every share of the capital stock of said bank held or owned by them, respectively, at the time of its failure; that the assess-
11 ment levied on the defendant, Dr. Salvatore Floria, as the owner and holder of one hundred (100) shares of the capital stock of said bank, amounts to One Thousand Dollars (\$1,000.00), which became due and payable on November 25, 1932, but the same has not, nor has any part thereof, been paid, although payment has been demanded; and that there is now justly due and owing from the defendant to the plaintiff the sum of One Thousand Dollars (\$1,000.00), together with interest thereon at six per cent (6%) per annum from November 25, 1932, and costs of

this suit, exclusive of all said set-offs, and just grounds of defense.

J. T. DINGER,
*Receiver of the International Exchange Bank,
Fifth and H Streets, N. W., Washington, D. C.*

Subscribed and sworn before me this 8th day of August,
A. D. 1934.

[SEAL.]

JOHN G. HUGHES,
Notary Public, D. C.

12 In the Municipal Court of the District of Columbia.

No. A10,730.

J. T. DINGER, Receiver of the International Exchange Bank,
a Corporation, Fifth and H Sts., N. W., Plaintiff,

vs.

DR. SALVATORE FLORIA, 943 Massachusetts Ave., Defendant.

PLEA—Filed August 22, 1934.

For a plea to the Declaration filed herein the defendant Dr. Salvatore Floria, by his attorneys, admits that the International Exchange Bank was incorporated on the date and at the place alleged and it duly empowered the Board of Directors to establish offices outside the place of incorporation; that it duly established its place of business in this City on the date alleged; that it became subject to the jurisdiction of the Comptroller of the Currency as alleged; that said Comptroller took possession of said Bank and that on the date alleged the said Bank was insolvent and unable to pay its debts; and that further, on said date a Receiver was appointed for said Bank as alleged; and the defendant further admits that the plaintiff J. T. Dinger, Receiver, qualified and is now acting as Receiver of said International Exchange Bank, a Corporation as alleged; that your defendant admits that the said corporation had a paid up capital of \$116,830 which consisted of and consists of 11,683 shares of the par value of \$10.00 per share. And your defendant further admits that an assessment and requisition was made upon the shareholders of the said International Exchange Bank for the amount of the capital

stock as alleged, but your defendant says that at the time
of said assessment and for a long time prior thereto
13 the said defendant was not the owner of any stock of
the said International Exchange Bank and that he
was not subject to any assessment as alleged, and your
defendant further denies each and every other allegation in
said Declaration alleged the same as if each had been
specifically denied except for those allegations heretofore
admitted.

LEWIS SHAPIRO,
MARK P. FRIEDLANDER,
Attorneys for Dr. Salvatore Floria, Defendant.

LEWIS SHAPIRO,
Rust Building,
MARK P. FRIEDLANDER,
Hill Building,
Attorneys for Defendant.

14 In the Municipal Court of the District of Columbia.
No. A 10,730.

J. T. DINGER, Receiver of the International Exchange Bank,
a Corporation, Fifth and H Sts., N. W., Plaintiff,

vs.

DR. SALVATORE FLORIA, 943 Massachusetts Ave., Defendant.

Affidavit of Defense.

DISTRICT OF COLUMBIA, ss:

Dr. Salvatore Floria being first duly sworn on oath deposes and says that he is the defendant in the above entitled cause and has personal knowledge of the matters and things herein stated; that he has a complete defense to the above cause of action for that he was not the owner and holder of any shares of stock on July 14, 1932, nor had he been for a long time prior thereto, and therefore your defendant says he should be hence dismissed with costs.

DR. SALVATORE FLORIA.

Subscribed and sworn to before me this 16 day of August, 1934.

[SEAL.]

MARGARET MACPHERSON,
Notary Public, D. C.

[Endorsed:] In the Municipal Court of the District of Columbia. No. A10,730. J. T. Dinger, Receiver, Plaintiff, vs. Dr. Salvatore Floria, Defendant. Affidavit of Defense Plea. Lewis Shapiro, Rust Building; Mark P. Friedlander, Hill Building, Attorneys for Defendant.

14a In the Municipal Court of the District of Columbia.
No. A.-10,730.

J. T. DINGER, Receiver of the International Exchange Bank,
a Corporation, Fifth and H Streets, N. W., Washington,
D. C., Plaintiff,

v.

DR. SALVATORE FLORIA, 943 Massachusetts Avenue, N. W.,
Washington, D. C., Defendant.

Joinder of Issue.

Filed August 29, 1934.

Now comes the plaintiff, J. T. Dinger, Receiver, by his attorneys, Sanders, Childs, Bobb & Wescott, and joins issue with the defendant in the above-entitled cause.

SANDERS, CHILDS, BOBB &
WESCOTT,
By THOS. S. MARKEY,
Attorneys for Plaintiff.

Service acknowledged this 28th day of August, 1934.

LEWIS H. SHAPIRO,
Atty. for Defendant.

15 In the Municipal Court of the District of Columbia.
No. A-10,730.

J. T. DINGER, Receiver of the International Exchange Bank,
a Corporation, Fifth and H Streets, N. W., Washington,
D. C., Plaintiff,

v.

DR. SALVATORE FLORIA, 943 Massachusetts Avenue,
Washington, D. C., Defendant.

Assignment of Errors.

Filed December 13, 1934.

The Court erred in granting defendant's motion for a directed verdict, at the close of plaintiff's case, for the following reasons:

1. The Court should have held that defendant was estopped to deny ownership of the stock as of the date of closing of the bank, in that he had acted as a stockholder and director after the date of the alleged transfer and even after the death of the transferee.

2. The Court should have held that the defendant as record owner did not do everything required of a reasonable prudent man to record the transfer, in that there was never a request that the transfer be recorded on the books of the Bank.

3. The Court should have held that the acquisition and disposal of the stock by the defendant was a personal transaction with the transferee, and that delivery of the certificate was to the transferee individually and not to the Bank.

The Court erred in other respects apparent of record.

SANDERS, CHILDS, BOBB &
WESCOTT,
By L. A. GRAVELLE,
Attorneys for Plaintiff.

THOS. S. MARKEY,
Of Counsel.

16 Copy of the above Assignment of Errors received this 13th day of December, 1934.

LEWIS H. SHAPIRO,
Attorney for Defendant.

17 In the Municipal Court of the District of Columbia.

No. A-10,730.

J. T. DINGER, Receiver of the International Exchange Bank,
a Corporation, Fifth and H Streets, N. W., Washington,
D. C., Plaintiff,

v.

DR. SALVATORE FLORIA, 943 Massachusetts Avenue,
Washington, D. C., Defendant.

Presentation of Bill of Exceptions.

December 13, 1934.

Now comes the plaintiff in the above-entitled cause by his attorneys of record, Sanders, Childs, Bobb & Wescott, and

respectfully presents to the Court his Bill of Exceptions, taken at the trial of said cause, and prays that the same may be signed, sealed and made part of the record of this cause.

SANDERS, CHILDS, BOBB &
WESCOTT,
By L. A. GRAVELLE,
Attorneys for Plaintiff.

THOS. S. MARKEY,
Of Counsel.

To Lewis Shapiro, Esq., Mark Friedlander, Esq., Rust Building, Washington, D. C.

Please take notice that the Bill of Exceptions referred to in the foregoing Presentation will be presented to the Court for settlement and signing on the — day of December, 1934 at 10 A. M. or as soon thereafter as counsel may be heard.

SANDERS, CHILDS, BOBB &
WESCOTT,
By L. A. GRAVELLE,
Attorneys for Plaintiff.

18 Receipt of copy of the foregoing notice and of copy of said Bill of Exceptions is hereby acknowledged this 13th day of December, 1934.

LEWIS H. SHAPIRO,
Attorney for Defendant.

19 [Submitted Dec. 13, 1934, Nathan Cayton Judge.]

In the Municipal Court of the District of Columbia.

No. A-10,730.

J. T. DINGER, Receiver of the International Exchange Bank, a Corporation, Fifth and H Streets, N. W., Washington, D. C., Plaintiff,

v.

DR. SALVATORE FLORIA, 943 Massachusetts Avenue, Washington, D. C., Defendant.

Bill of Exceptions.

Be it remembered, That the above-entitled cause came on for trial before the Honorable Nathan Cayton and a

jury, duly empaneled and sworn to try the issues herein, on November 6, 1934.

Whereupon the plaintiff, **J. T. Dinger**, Receiver, in order to maintain the issues on his part joined, came to the witness stand in his own behalf and testified in substance as follows:

That he is the Receiver of the International Exchange Bank and was appointed July 30, 1932 by the Comptroller of the Currency, having superceeded W. H. Blanz who had been appointed Receiver July 14, 1932, the date of closing of the bank, and that the books and records of the bank have been under his personal supervision since that time. He identified the "Stock Certificate" book of the bank, and the same was received in evidence. Witness testified that said book shows Stock Certificate No. 943 for one hundred (100) shares of International Exchange Bank stock was issued to S. Floria, defendant, on March 24, 1931, the same having been transferred from J. Schiavone. Witness
20 identified Stock Certificate No. 943 issued to Salvatore Floria for one hundred (100) shares of the par value of Ten Dollars (\$10.00) per share, and said Certificate was received in evidence. Witness testified that the stock certificate shows that it had never been canceled. Witness further testified that he made oral demand on the defendant for the payment of one hundred percent (100%) assessment on the one hundred (100) shares of stock, and that the assessment had not been paid.

On Cross-Examination the witness testified that he frequently discussed the stock assessment with defendant at the bank after the date of receivership, but denied that he said suit would not be filed.

Thereupon, **Frank J. Kaufman** was called as a witness by and on behalf of the plaintiff and testified in substance as follows: That he was cashier of the bank and secretary of the Board of Directors from 1921 to 1928; Vice-President and cashier from 1928 to December 1931; and President from December 1931 to July 14, 1932, the date of closing of the bank. Witness identified the "Stockholders Ledger" book and testified that the entries therein were made by him in the regular course of business and that it contained an individual account for each stockholder. Said "Stock-

holders Ledger" book was received in evidence. Witness testified that said book contained a ledger sheet for the defendant, showing defendant acquired one hundred (100) shares of bank stock March 24, 1931 and that there is no record of defendant disposing of these shares and that he was still the record owner of the one hundred (100) shares on July 14, 1932, the date the bank closed. Witness testified further that Certificate No. 943 was not canceled and pasted to the stub in the "Stock Certificate" book, which was the usual practice of the bank in the transfer of stock and recording thereof. Witness testified that the records showed defendant had no other stock besides the one hundred (100) shares after March 24, 1931.

Witness identified a record book of the bank containing the minutes of the meetings of the Board of Directors, and this book was received in evidence. He testified that the minutes show defendant was elected a Director of the bank on March 12, 1931; that the minutes further showed defendant attended, as a Director, the meetings of the Board on April 9, 1931; May 14, 1931; June 11, 1931; July 9, 1931; September 10, 1931; and November 5, 1931. Witness said he attended these meetings and that the defendant was actually present. A certified copy of the death certificate of Joseph Schiavone, former President of the bank, showing his death on November 11, 1931, was received in evidence. Witness testified further that the minutes show defendant attended the Directors' meetings on November 12, 1931; November 17, 1931; and December 10, 1931. The meeting of November 12, 1931 was held at the Madrillon Restaurant at 8 P.M., and the minutes thereof were read by the witness as follows:

"Because of the death of the President, Mr. Joseph Schiavone, on the previous evening, it was deemed wise not to show any lights in the bank at night.

"The following Directors were present: Messrs. Barr, Borrass, Del Vecchio, Floria, Heffron, Dr. Jaffe, Lyle, Kaufmann, Maiatico and Weinstein.

"The minutes of the previous meeting on November 5, 1931, which was a special meeting, was read and approved as amended. Inasmuch as these minutes were in rough draft the recording as now shown is correct.

"The list of loans was read, and loans from 39458 to 40347 were approved.

"On motion of Dr. Floria, Mr. Camp, Mr. Barr and Mr. Weinstein were named as a committee to draw up resolutions on the death of Mr. Joseph Schiavone president.

22 "The Altamonte real estate loan was discussed, but no action was taken thereon.

"After general discussion the meeting adjourned at 9 P.M.

(Signed)

HUGH W. BARR,

Secretary pro tem.

Approved:

(Signed)

F. J. KAUFMANN, JR.,

Chairman."

Witness said he also attended these meetings in November and December 1931 and that defendant was actually present. Witness then read Section 1 of Article II of the by-laws of the bank as follows:

"The Board of Directors shall consist of not less than five nor more than thirty members, who may be non-residents of the State of Arizona, but shall be stockholders."

Witness testified that on or about December 10, 1931 defendant said he would like to resign as a Director, but was persuaded by witness and possibly two or three other Directors to continue to the end of the year and he would not be re-elected in January.

Witness identified his signature on the reverse side of Stock Certificate No. 943 and said he was the attesting witness to the signature of defendant, and that Joseph Schiavone was present at the time. Witness said he was personally in charge of the "Stockholders Ledger" book in 1931 and that neither the defendant, nor anyone else in the presence of defendant, ever requested witness to transfer the stock on the books of the bank. Witness testified that Stock Certificate No. 943 was never handed to him for the purpose of effecting a transfer on the books of the bank, to anyone else.

On cross-examination the witness testified that he was vice-president of the bank during September and October 1931 and that he saw the defendant at the bank during that period; that defendant was not present at the
23 Directors' meetings from July 9, 1931 to September 1931 because he was a very sick man and witness believed that he was in the hospital for more than three

weeks and witness knew he was convalescing for quite a while after that. He testified that Joseph Schiavone, while President, in September or October 1931 called witness from his adjoining office in the bank while defendant and Schiavone were discussing Stock Certificate No. 943; and witness said the following transaction occurred:

“Dr. Floria tendered this certificate to Mr. Schiavone, requesting him to accept it, because he did not wish to be connected with the bank any longer in the capacity of Director; that he had been ill and that he did not feel capable of the duties, and Mr. Schiavone reluctantly accepted the certificate from Dr. Floria, and I was asked to witness the signature of Dr. Floria on the assignment.”

that Schiavone requested defendant to remain as a Director, until his term expired, in order to keep a good face on the bank, and at the same time Schiavone accepted Certificate No. 943 from the defendant. Witness further testified that Certificate No. 943 was drawn up in March 1931 at the request of Schiavone and witness doesn't know the purpose for which it was issued to defendant except that being a Director required defendant to be a stockholder. Witness didn't know if defendant paid for the stock. Thereupon the following questions and answers followed:

“Q. But you do recall the period in October or September 1931, when this stock certificate, duly assigned, was witnessed by you and handed to Mr. Schiavone, who was the president of the bank at that time? A. That is correct.

“Q. And no other conversation took place between you and Mr. Schiavone, at that time or later, about this stock; is that correct? A. That is correct. I don't think anything else happened.

“Q. But a short while after, Mr. Schiavone died, did he not? A. That is true.

24 “Q. And the stock was among the papers of his estate, was it not; do you know that? A. I know that the stock certificate was found in his desk by his own son Harry and myself, two or three days after the funeral.”

Witness testified that defendant did not attend any meetings of the Board of Directors after December 1931.

Witness said that in September or October 1931 when defendant endorsed Certificate No. 943 and transferred it

to Schiavone, the bank was solvent and at that time the certificate was handed to Schiavone and the intention of that tender or submission to Mr. Schiavone was in order to transfer the stock to Schiavone. Witness testified further that Schiavone said he wanted the defendant to become a stockholder and Director because defendant was a practicing physician, was well liked, and had a good following among the Italians and his name would add prestige to the bank.

Witness was then examined as to the defendant's stock holdings prior to the acquisition of the one hundred (100) shares in March 1931, which is the subject matter of this suit, and his attention was directed to the account sheet of defendant and witness testified as follows:

"Q. Now, will you look at this page, and will you explain to the Court and jury the meaning of the entries under February 18, 1926, where it says 'Transferred from owner to J. Schiavone' and shows 100 shares? A. Yes.

"Q. What is the meaning of that sentence? A. That means that on February 18, 1926, Stock Certificate No. 667 was issued to Dr. Salvatore Floria, by reason of the stock surrendered by J. Schiavone on Certificates 643 and 656, and 100 shares were written in Dr. Floria's name.

"Q. What happened to those shares of stock? A. On January 30, 1928, those shares were transferred to Joseph Schiavone and a new certificate issued, No. 785.

* * * * *

25 "Q. And the item below that is the issuance of 100 shares in March of 1931? A. That is correct.

"Q. Now, can you tell us if you know when Mr. Schiavone became the chief stockholder of the International Exchange Bank for the first time? A. For the first time?

"Q. Yes. A. He became that in July 1921.

"Q. 1921, and did there come a time when he ceased to have control over this bank, or sold his stock in this bank? A. He did in February 1928.

"Q. That is the time that Dr. Floria transferred his stock, the first lot? A. About three weeks before that transfer.

"Q. And do you know whether or not, as a result of Mr. Schiavone's transfer of this stock that Dr. Floria transferred his? A. Yes, I do know that.

"Q. That was all the same transaction, was it not? A. No, this was transferred on January 30 and the transfer of the control was not made until February 18.

"Q. I misunderstood you. Dr. Floria's transfer is the first? A. It is.

"Q. And then Mr. Schiavone transferred the stock that he had received from Dr. Floria? A. Yes.

"Q. Do you know whether or not—well, I will not ask that. Will you look at this stock certificate book, please? A. Yes.

"Q. And will you look at that little stub for the certificate issued to Dr. Floria? A. The last one?

26 "Q. Yes. A. Yes.

"Q. Now, that shows that the stock was transferred to whom? A. Salvatore Floria.

"Q. By whom? A. J. Schiavone.

"Q. And that is the 100 shares referred to in this case? A. It is."

Witness testified he did not know what consideration passed from defendant to Schiavone March 1931 when the one hundred (100) shares were transferred from Schiavone to defendant, but he does know defendant received Certificate No. 943 at that time and did qualify as a Director, and when defendant returned to the bank in September or October 1931 he signed the back of Certificate No. 943 at Schiavone's request, and on the line indicated by Schiavone, and Schiavone called in the witness to witness the signature for the purpose of transferring the stock.

On Redirect Examination, witness testified that in all instances it was the practice of the bank to have the seal on the stock certificate obliterated or torn out when a stock certificate was being canceled. Witness said it was his impression that the purpose of the signature of defendant was to make an assignment to Schiavone. Witness was then excused.

Thereupon it was stipulated and agreed between counsel that the defendant received written notice of the stock assessment, in a notice entitled "Assessment upon Shareholders", copy of which was received in evidence (see Exhibit A attached to Declaration). It was further stipulated between counsel that the laws of Arizona (place

27 of incorporation of the bank) and the Federal statutes created a liability in the defendant for the assessment, if he was a stockholder on July 14, 1932, the date of closing of the bank. The Articles of Incorporation of the bank were received in evidence and Article VI thereof was read to the jury as follows:

“The affairs of this corporation shall be conducted by a board of not less than five nor more than thirty directors, by whom the president and vice-president and secretary and treasurer and other necessary and proper officers shall be appointed. The directors shall be elected by and from among the stockholders of the corporation on the first Monday in June of each year.”

Counsel for the plaintiff then read to the jury the language on the face of Certificate No. 943 as follows:

“This certifies that Salvatore Floria is the owner of 100 shares of the capital stock of International Exchange Bank transferable only on the books of this corporation in person or by attorney upon the surrender of this certificate properly endorsed.”

Thereupon plaintiff rested.

The foregoing is the substance of all the evidence given and offered at the trial.

Thereupon the defendant by his counsel, moved the Court, at the conclusion of plaintiff's case for a directed verdict which motion was granted by the Court. To this ruling and action of the Court, the plaintiff by its counsel then and there prayed an exception and the same was allowed said plaintiff.

And the plaintiff now prays the Court to sign and seal this Bill of Exceptions, and the same is accordingly done, and the Court signs and seals this Bill of Exceptions now for then, this 28th day of December, 1934.

NATHAN CAYTON,

Justice.

Settled by consent:

L. A. GRAVELLE,

Attorney for Plaintiff,

LEWIS H. SHAPIRO,

Attorney for Defendant.

28 In the Municipal Court of the District of Columbia.

No. A-10,730.

J. T. DINGER, Receiver of the International Exchange Bank,
a Corporation, Fifth and H Streets, N. W., Washington,
D. C., Plaintiff,

v.

DR. SALVATORE FLORIA, 943 Massachusetts Avenue, Wash-
ington, D. C., Defendant.

Designation of Record.

Filed December 13, 1934.

To the Clerk of the Municipal Court of the District of
Columbia:

The following papers are designated as the record for
the United States Court of Appeals for the District of
Columbia:

1. Declaration.
2. Particulars of Demand.
3. Defendant's Plea.
4. Joinder of Issue.
5. Assignment of Errors.
6. Presentation of Bill of Exceptions.
7. Bill of Exceptions.
8. This Designation.

SANDERS, CHILDS, BOBB & WESCOTT,
By L. A. GRAVELLE,
Attorneys for Plaintiff.

Copy of foregoing Designation of Record received this
13th day of December, 1934.

LEWIS H. SHAPIRO,
Attorney for Defendant.

29 [Stamp:] Municipal Court, District of Columbia.
Filed Nov. 27, 1934.

UNITED STATES OF AMERICA, ss:

The President of the United States, To the Honorable Nathan Cayton, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between J. T. Dinger, Receiver of the International Exchange Bank, Plaintiff, and Dr. Salvatore Floria, Defendant, A-10,730, a manifest error hath happened, to the great damage of the said Plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 27th day of November, in the year of our Lord one thousand nine hundred and thirty-four.

[Seal United States Court of Appeals for the District of Columbia.]

HENRY W. HODGES,
*Clerk of the United States Court of
Appeals for the District of Co-
lumbia,*

By MONCURE BURKE,
Deputy Clerk.

Allowed by

JOSIAH A. VAN ORSDEL,

*Associate Justice of the United States Court of
Appeals for the District of Columbia.*

30 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 30, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, At Law, No. A10730, wherein J. T. Dinger, Receiver of the International Exchange Bank, A Corporation, is plaintiff, and Dr. Salvatore Floria, is defendant, as the same that remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of January, 1935.

[SEAL.]

BLANCHE NEFF,
Clerk.

Endorsed on cover: In error to the Municipal Court. No. 6400. J. T. Dinger, Receiver of the International Exchange Bank, a Corporation, Plaintiff in Error, vs. Dr. Salvatore Floria. United States Court of Appeals for the District of Columbia. Filed Jan. 18, 1935. Henry W. Hodges, Clerk.

(5926-C)

FILED MAR 3 0 1935

Henry H. Dodge

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 6400.

J. T. DINGER, RECEIVER OF THE INTERNATIONAL
EXCHANGE BANK, A CORPORATION,
Plaintiff in Error,

v.

DR. SALVATORE FLORIA, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

L. A. GRAVELLE,
THOMAS S. MARKEY,
Attorneys for Plaintiff in Error.

INDEX.

	PAGE
Statement.....	1
Assignment of errors.....	3
Argument.....	4
Point I:	
Defendant estopped to deny ownership, having acted as stockholder and director after date of alleged transfer and even after death of transferee.....	4
Point II:	
Defendant liable for assessment, for failure to request proper bank officer to record the transfer.....	8
Point III:	
Delivery of the certificate was to the transferee individually, as vendee, and not as an officer of the bank.....	12
Conclusion.....	14

CITATIONS.

	PAGE
Dellert <i>v.</i> Stallman, 29 F. (2d) 236.....	10, 13
Farmers' State Bank of Mobridge <i>v.</i> Empey, 150 N. W. 936.....	7
Germania Nat. Bank <i>v.</i> Case, 99 U. S. 628; 25 L. Ed. 448.....	7
Kenyon <i>v.</i> Fowler, 155 F. 107.....	6
Knickerbocker Trust Co. <i>v.</i> Myers, 133 F. 764.....	11
Logan <i>v.</i> Crissinger, 290 F. 415.....	6
Matteson <i>v.</i> Dent, 176 U. S. 521; 44 L. Ed. 571.....	4
Newton Nat. Bank <i>v.</i> Newbegin, 74 F. 135.....	14
Price <i>v.</i> Whitney, 28 F. 297.....	9
Richmond <i>v.</i> Irons, 121 U. S. 27; 30 L. Ed. 864.....	8, 12, 13

Schofield <i>v.</i> Twining, 127 F. 486.....	9
Scott <i>v.</i> Deweese, 181 U. S. 202; 45 L. Ed. 822.....	5
Whitney <i>v.</i> Butler, 118 U. S. 655; 30 L. Ed. 266....	8, 10, 12
Young <i>v.</i> McKay, 50 F. 394.....	10
12 U. S. C. A. 52.....	11

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

No. 6400.

J. T. DINGER, RECEIVER OF THE INTERNATIONAL
EXCHANGE BANK, A CORPORATION,
Plaintiff in Error,

v.

DR. SALVATORE FLORIA, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Suit was filed in the Municipal Court by the Receiver of the bank (Plaintiff in Error) to recover from Dr. Floria (Defendant in Error) a 100% assessment on 100 shares of ten dollar par value capital stock of the bank, owned by him and appearing in his name on the books of the bank on July 14, 1932, the date of closing of the bank by order of the Comptroller of the Currency. Defendant conceded the authority in law for the assessment of stockholders of the bank and the right of the Receiver to institute suit to recover stock assessments from the true owners thereof.

He defended, by way of plea, that on July 14, 1932, and for a long time prior thereto he was not the owner of the 100 shares, and therefore was not liable for the

assessment. Specifically, his defense was that he did not own the stock on July 14, 1932, in that he had transferred the same in September or October, 1931, to Joseph Schiavone, who was at that time president of the bank.

At the trial in the lower court, before a jury, two witnesses were called, namely, the Receiver and F. J. Kaufmann, a former officer of the bank. At the close of plaintiff's case, defendant moved for a directed verdict, which motion was granted and exception duly noted by the plaintiff.

All of the material evidence is summarized at pages 13 to 19, inclusive, of the Record. Briefly, the evidence showed that defendant acquired the 100 shares in March, 1931, from Joseph Schiavone and thereupon became a member of the Board of Directors of the bank. Defendant was the record owner of the stock from then until July 14, 1932—the "Stockholders Ledger" book contained an individual ledger sheet for the defendant showing his ownership of the 100 shares; the "Stock Certificate" book contained a stub for Certificate No. 943 for 100 shares in the name of the defendant; and the corporate seal on the stock certificate was never obliterated or torn, nor was the certificate cancelled and pasted to the stub, as was the customary method of the bank in the transfer of stock and recording thereof.

The testimony was that defendant endorsed the certificate, which endorsement was attested by Kaufmann, and that there was a physical transfer of possession of Stock Certificate No. 943 from the defendant to Joseph Schiavone in September or October of 1931, at which time the defendant, because of ill health, wanted to sever his connections with the bank as a director and stockholder. At that time

Schiavone prevailed upon defendant not to resign as a director. The evidence showed that defendant did not then or at any time request the proper bank officer (Kaufmann, the cashier) to record the transfer. The certificate was never handed to the proper transfer officer for recording on the books of the bank. After Schiavone's death on November 11, 1931, Certificate No. 943 was found among his personal effects. *The by-laws and articles of incorporation of the bank provided that it was necessary to be a stockholder in order to be a director* and the testimony showed conclusively that the defendant attended meetings of the Board of Directors after the transfer of the physical possession of the stock certificate, and even after November 11, 1931, when Schiavone died, and as late as December 10, 1931. Defendant remained as a director at the solicitation of the bank officers with the understanding that he would not be re-elected a director at the January meeting. When defendant ceased to be a director in January, he did not request that the stock transfer be recorded, nor did he take any steps to apprise persons dealing with the bank that he had disposed of his stock.

ASSIGNMENT OF ERRORS.

The court erred in granting defendant's motion for a directed verdict for the following reasons:

1. Defendant was estopped to deny ownership of the stock as of the date of closing of the bank, in that he acted as a stockholder and director after the date of the alleged transfer and even after the death of the transferee.

2. Defendant as record owner did not do everything required of a reasonably prudent man to record the

transfer, in that there was never a request that the transfer be recorded on the books of the bank.

3. Delivery of the certificate was to the transferee individually and not to the bank.

ARGUMENT.

Point I.

Defendant estopped to deny ownership, having acted as stockholder and director after date of alleged transfer and even after death of transferee.

In determining whether the defendant is liable in this case, it must be remembered that this is not an action between the defendant and Joseph Schiavone (the transferee) or the estate of Joseph Schiavone. The transfer of the stock certificate may have been effectual between the parties, and, as between them, sufficient to pass title to the stock. But here the question of liability of the defendant is to be decided with reference to the rights of third persons. The plaintiff is the Receiver of the bank and he brings this action as the representative of stockholders and creditors. In *Matteson v. Dent*, 176 U. S. 521, 531; 44 L. Ed. 571, 576, Mr Justice White remarked:

“In *Shellington v. Howland*, 53 N. Y. 376, it was said:

* * * ‘There may have been a transfer by the defendant of his stock to the corporation in 1869, valid as between the parties to the transaction, and sufficient to vest the equitable title in the transferee, but the transfer was not consummated in the form required by statute, so as to affect the rights of strangers or to relieve the defendant from his legal liability to third persons for the

debts of the corporation * * * The transfer of stock, *quoad* the public, is not complete until entered on the book designated by statute. An entry upon the books of registry of stockholders is required for the protection of the company and its creditors, and each may hold the stockholders to their liability as such until they have divested themselves of the title to their shares by a complete transfer, as prescribed by law. No secret transfer will avail to release the stockholder from his obligations, or deprive the creditors of the corporation of the right to look to him as the responsible party liable for the debts of the corporation.'

Indeed, this doctrine is so universally settled that it is treated as elementary. See *Thomp. Corp.* §§ 3283, 3284."

The same thought was expressed by Mr. Justice Harlan in *Scott v. Deweese*, 181 U. S. 202, 213: 45 L. Ed. 822, 828:

"The present suit is primarily in the interest of creditors of the bank. It is based upon a statute designed not only for their protection, but to give confidence to all dealing with national banks in respect of their contracts, debts, and engagements, as well as to stockholders generally. If the subscriber became a shareholder in consequence of frauds practised upon him by others, whether they be officers of the bank or officers of the government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of § 5151, if, at the time the rights of creditors accrued, he occupied and was accorded the rights appertaining to that position."

Did the defendant by his action or inaction, so deal with this stock as not to mislead the stockholders,

creditors and other persons dealing with the bank? Since defendant acted as a director as late as January, 1932, and was at all times record owner of the stock, plaintiff contends he is estopped to deny ownership. This may be a technical rule but it is none the less the law, as pointed out in *Kenyon v. Fowler*, 155 F. 107, 108:

“It can not be denied that the rule invoked by the plaintiff, and followed by the Circuit Court, is a severe and drastic one imposing upon the stockholder the duty, after he has sold and assigned his stock, of seeing to it that his name is removed from the books of the bank. In the case at bar the defendant would have had no difficulty in doing this, but in many cases, where the certificates are assigned in blank and the stockholder does not know who the purchaser is, it might become an exceedingly arduous and complicated undertaking. Nevertheless, we are constrained to hold, under the authorities which must govern our action, that the court below was right in directing a verdict for the plaintiff. Harsh as the rule may seem, it is clear that it is necessary for the speedy and efficient winding up by the Comptroller of the affairs of insolvent banks.”

The fact that defendant remained as a director as late as January, 1932, is undisputed, and why he did it (even though at the solicitation of the bank officers) is immaterial. This principle is clearly set forth in *Logan v. Crissinger*, 290 F. 415, in which case the record holder was held liable for an assessment although there had been a sale of the stock and delivery by him of the certificate properly endorsed. The evidence showed that he had voted all of the stock after the alleged sale and, therefore, was estopped to deny ownership. The court said at page 417:

“At a meeting of the stockholders on January 11, 1921, Logan voted the whole of this stock, with other 10 shares, as the owner and holder thereof. *Why he did it is immaterial. The fact is that he thus exercised ownership.*” (Italics supplied.)

In *Farmers' State Bank of Mobridge v. Empey*, 150 N. W. 936, the court said:

“If * * * a person voluntarily assumes the relation of stockholder, and voluntarily procures or permits his name to be recorded as such on the corporate records, he fixes his own status and is liable for the consequences. This is sometimes placed on the ground of estoppel, or of a holding out, somewhat as one who holds himself out as a partner is held as such. And there may well be an estoppel as to those who become creditors while the alleged stockholder is recorded as such with his own consent, for creditors are presumed to extend credit on the faith of the showing made upon the corporate books. But liability as a stockholder does not depend upon estoppel alone, for the liability extends to past as well as to future debts.”

The same principle was announced in *Germania Nat. Bank v. Case*, 99 U. S. 628, 631; 25 L. Ed. 448, 449, as follows:

“One (reason) is that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; * * *”

In the instant case, therefore, the creditors of the bank by examining the minutes of the board of directors would have learned that the defendant was a director

as late as January, 1932 (and therefore, necessarily a stockholder because it was essential that a director be a stockholder). There is no evidence that defendant took any action with respect to divesting himself of his stock holdings between January and July 14, 1932, when the bank closed. Furthermore, the creditors of the bank by referring to the "Stock Certificate" book and the "Stockholders Ledger" book would have been advised that defendant was a stockholder from the date of acquisition of the stock, namely, March, 1931, to July 14, 1932.

Point II.

Defendant liable for assessment, for failure to request proper bank officer to record the transfer.

Generally the record owner of bank stock is liable for the assessment and will only be relieved from liability upon transferring the stock, when he has done everything a reasonably prudent man should do to have the transfer recorded on the books of the bank. The courts have held that the record owner is not relieved from liability unless there has been a specific request made to the proper bank officer to record the transfer. In *Whitney v. Butler*, 118 U. S. 655; 30 L. Ed. 266, there was a specific request that the transfer be recorded and the record owner was held not liable, whereas in *Richmond v. Irons*, 121 U. S. 27; 30 L. Ed. 864, there was no such specific request and the record owner was held liable. In the instant case, there is no evidence of a specific request, and therefore plaintiff contends that *Richmond v. Irons* is controlling. In the *Richmond v. Irons* case the court, speaking of the *Whitney v. Butler* case, remarks at 30 L. Ed. 874:

“Here there is no proof, as there was in that case, of the delivery of the certificate to the bank and a power of attorney authorizing its transfer, with a *request to do so made at the time of the transaction.*” (Italics supplied.)

The record owner was held liable for the assessment in *Price v. Whitney*, 28 F. 297, even though there had been a bona fide sale to a third party at the request and with the assistance of the president of the bank. The president actually participated in the transaction and the stock certificates were delivered to him but there was no request that the transfer be recorded. The court said it was the defendant's duty to see that the stock was transferred on the books of the bank.

In *Schofield v. Twining*, 127 F. 486, the record owner was held liable when the evidence showed that there had never been a request made to the bank officer in charge of the transfer book to transfer the shares to the purchaser's name. The court said the burden was on the record holder to show that a proper attempt had been made to have the transfer recorded on the books of the bank. The stock was sold by one Twining to his son, who was a director of the bank. The transfer was never recorded and the court said at page 487:

“I do not think the fact important that the son was a director of the bank at the time. It is probably true that he was an influential personage in the councils of the board, but he was not the transfer agent of the stock, and could not himself have made the requisite entries upon the books of the bank. Merely as director, he had no authority to direct the cashier to make the transfer. His right to give such an order, or make a request of a similar character, was based upon the fact that he had bought the shares, and was entitled, as the

purchaser, to have them transferred, or upon the fact that he was the seller's agent for the specific purpose of having the transfer made upon the books. In the most favorable aspect for the defendant, he was his father's agent; and his failure to request the proper officer to transfer the shares was merely the failure of an agent to perform a duty that he had promised his principal to perform, and for such default the principal must bear the consequences."

The record holder was relieved from liability in *Dellert v. Stallman*, 29 F. (2d) 236, but there was definite proof that the cashier of the bank had agreed to record the transfer. To the same effect is *Young v. McKay*, 50 F. 394, where there was a specific request that the cashier record the transfer on the stock register book and a promise by the cashier in taking the certificate that he would record it. The court specifically stated that because of these facts, the *Whitney v. Butler* case was controlling. District Judge Hawley, after pointing out the general rule that the record owner is liable, states at page 397:

"If it be true, as is held in *Whitney v. Butler*, that the seller of the stock should not be held liable as a shareholder when it affirmatively appears that he has done all that a careful, prudent business man could reasonably do to effect a transfer on the stock register, and that it is a sufficient compliance of this rule if the seller of the stock has taken the precaution, after the sale of the stock, to surrender the certificate to the bank, properly endorsed, with the request that the transfer be made on the books of the bank, then it must necessarily follow that, upon the facts presented in this case, the defendant can not be held liable as a stockholder."

In the instant case, defendant does not come within the exception pointed out because there was no request that the transfer be recorded.

The stock certificate itself, in the case at bar, showed that the stock was "transferable only on the books of this corporation" (R. 19). Furthermore, the statute provides that the stock shall be transferable on the books (12 U.S.C.A. 52). The case of *Knickerbocker Trust Co. v. Myers*, 133 F. 764, is in point, and the court at page 770 said:

"In the present instance the defendant, although warned by the certificate, simply indorsed it and turned it over to the party to whom he sold the shares; making no effort to see that the transfer was completed by a proper registry of the transaction on the books of the company. In this he failed in his duty both to himself and to all concerned, and can not escape the consequences of his neglect upon the showing which is now made."

Plaintiff contends that, applying the law as stated in the above cases, the defendant is liable for failure to request a recording of the transfer by the proper bank officer. The proper bank officer in this case was Kaufmann, who was in charge of the stock books of the bank (R. 15). He testified that neither the defendant nor any one else in the presence of the defendant ever requested him to transfer the stock on the books of the bank, and further, that the certificate was never handed to him for the purpose of effecting the transfer (R. 15).

Point III.

Delivery of the certificate was to the transferee individually, as vendee, and not as an officer of the bank.

Kaufmann was the bank officer in charge of the stock books and the certificate was never delivered to him for the purpose of recording (R. 15). Delivery to Kaufmann would have constituted delivery to the bank. Instead of delivering the certificate to Kaufmann in September or October, 1931, at the time of the transaction, the certificate was handed to Schiavone and retained by him. In November, after Schiavone's death, the certificate was found among his personal effects (R. 16).

In the case of *Whitney v. Butler* the certificate was delivered to the bank itself and therein differs from the present case. To support the contention that there was no delivery to the bank, plaintiff relies on the Supreme Court case of *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864. The question was whether or not Comstock, the record owner at the date of suspension of business, was liable for an assessment on 150 shares of bank stock. The facts were that in 1872 he admittedly owned 150 shares. On February 8, 1873, he sold 50 shares to Holmes, the president of the bank; in June, 1873, he sold 50 shares to Maynard; and on September 23, 1873, the date of suspension, he sold the remaining 50 shares to Holmes, the president. The last named shares were transferred on the books the day after suspension of business and the court held the transfer was fraudulent in law because made in contemplation of insolvency and, therefore, Comstock was liable. As to the other 100 shares, namely, the 50 shares sold February 8, 1873, to Holmes, and the 50

shares sold in June, 1873, to Maynard, such transfers were recorded on September 23, 1873, the date of suspension, and on the following day. The court said there was no reason to suspect that these 100 shares were not sold in entire good faith and without any expectation on the part of the parties of the insolvency of the bank, but nevertheless, Comstock continued to be upon the books of the bank as the owner of these shares until September 23 and September 24, 1873, and therefore was liable. It is significant that the purchaser of the stock, as in the case at bar, was the president of the bank. The court clearly points out that the delivery of the stock certificates was to Holmes as vendee and not as president, in the following language at 30 L. Ed. 874:

“The case is not within the rule laid down in *Whitney v. Butler*, 118 U. S. 655. Here there is no proof, as there was in that case, of the delivery of the certificate to the bank and a power of attorney authorizing its transfer, with a request to do so made at the time of the transaction. *The delivery was to Holmes, not as president, but as vendee.*” (Italics supplied.)

The fact that in the *Richmond v. Irons* case the delivery was to Holmes not as president of the bank but as an individual was pointed out in the case of *Dellert v. Stallman*, 29 F. (2d) 236, in which case the defendant was held not liable for the stock assessment because, among other things, there was proof of delivery of the certificate to Heller, the cashier—which was delivery to the bank. Similarly, in the case at bar, the certificate should have been delivered to Kaufmann, the cashier, if it was the intention that the stock be transferred and recorded at that time. It was not the

intention, however, for the defendant to sever his connection with the bank at that time, since the evidence shows conclusively that the defendant was to remain and did remain as a director. Since he was an influential Italian and a well-respected practicing physician (R. 17) and held himself out as a stockholder and director, he was able to mislead the creditors and depositors of the bank. He can not now ignore his responsibility as a stockholder. Perhaps the language in *Newton Nat. Bank v. Newbegin*, 74 F. 135, 140, is appropriate:

“When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion.”

CONCLUSION.

It is respectfully submitted that the lower court erred in granting defendant's motion for a directed verdict.

L. A. GRAVELLE,
THOMAS S. MARKEY,
Attorneys for Plaintiff in Error.

FILED APR 19 1938

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

—
No. 6400.
—

J. T. DINGER, Receiver of the International Exchange
Bank, A Corporation, *Plaintiff in Error.*

vs.

DR. SALVATORE FLORIA, *Defendant in Error.*

—
BRIEF FOR DEFENDANT IN ERROR.
—

LEWIS H. SHAPIRO,
MARK P. FRIEDLANDER,
ROBERT I. SILVERMAN,
Attorneys for Defendant in Error.



INDEX.

	Page
Disposition of Case	1
Statement of Facts	2
Argument	4
Point I:	
The presumption of liability for an assessment on shares of stock in an insolvent bank arising from the presence of a person's name on the stock ledger is rebutted by evidence that the record owner has transferred his stock and has done all that a careful business man can be required to do to effect such transfer	5
Point II:	
The facts show that, within the meaning of guiding federal cases, the defendant Floria did all that a reasonable, prudent business man was required to do when he transferred his stock to Schiavone	6
Point III:	
It is not necessary that the shareholder in express language direct that the change be made on the books when the proper officers of the bank witness the transfer and fully understand from all the circumstances that they are to enter the transfer on the stock books	14

Point IV:	Page
The defendant is not estopped to deny his liability by reason of the fact that he attended three directors' meetings at the request of the bank's officers when he was no longer a stockholder in the bank.....	18
Point V:	
While the delivery of the stock might have been to the President as transferee, the bank had notice through him, and through the officer in charge of the transfer books that a change in ownership had taken place	21
Conclusion	24

CITATIONS.

Apsey v. Kimball, 221 U. S. 514, 523; 31 S. Ct. 695	6
Dellert v. Stallman, 29 Fed. (2nd) 236.....	17, 23
Earle v. Carson, 188 U. S. 42, 47; L. Ed. 373; 107 Fed. 639	5
Earle v. Coyle, 38 C. C. A. 226, 97 Fed. 410.....	5
Hayes v. Shoemaker, 39 Fed. 319	6, 12
Kenyon v. Lawler, 155 Fed. 107.....	19
Keyes v. Myhre, 143 Minn. 193; 173 N. W. 422....	16
Logan v. Crissinger, 290 Fed. 415	21
Matteson v. Dent, 176 U. S. 521; 44 L. Ed. 571; 20 Sup. Ct. Rep. 419	5, 19
Price v. Whitney, 28 Fed. 297	17
Richmond v. Irons, 121 U. S. 27; 30 L. Ed. 864; 7 Sup. Ct. Rep. 788	5, 14, 16, 18
Schofield v. Twining, 127 Fed. 486	17
Scott v. Deweese, 181 U. S. 202, 213.....	19
Snyder v. Foster, 73 Fed. 136; 19 C. C. A. 406.	10, 19, 22, 24
Weakley v. McClarty, 136 Ky. 837; 125 S. W. 265..	14
Whitney v. Butler, 118 U. S. 655; 30 L. Ed. 266; 7 Sup. Ct. Rep. 61	5, 6, 7, 11, 14, 17, 18, 19, 20

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

No. 6400.

J. T. DINGER, Receiver of the International Exchange
Bank, A Corporation, *Plaintiff in Error.*

VS.

DR. SALVATORE FLORIA, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

DISPOSITION OF CASE.

The plaintiff in error brought suit against the defendant in error in the Municipal Court claiming \$1,000 on a stock assessment. After the conclusion of the plaintiff's case the Court directed a verdict for defendant in error. From this verdict the plaintiff in error appeals.

STATEMENT OF FACTS.

The evidence showed that the defendant was a prominent practicing physician who had a good following among the Italian people of the City. In order to add prestige to the name of the bank the President desired to have Dr. Floria serve as a director of the bank (T. 17). The by-laws required that every director must be a stockholder (T. 15). On the 24th day of March, 1931, one hundred shares of stock of the International Exchange Bank were issued to the defendant (T. 13) by Schiavone as shown by the stock certificate book of the bank and the stockholder's ledger (T. 14), and on the date of the closing of the bank this certificate remained in the name of the defendant. Mr. F. J. Kaufmann, Vice President and Cashier at the time of the transfer, who was called as a witness at the trial, testified that he did not know what consideration passed from defendant in March, 1931, when the shares were transferred to the defendant (T. 16, 18) nor did he know the purpose for which it was issued to the defendant except that being a director required defendant to be a stockholder (T. 16).

The evidence showed that F. J. Kaufmann was the Vice President and Cashier of the Bank and was in charge of the stockholders' ledger book (T. 15). He testified that Dr. Floria was not present at director's meetings from July 9, 1931, to September, 1931, because he was a very sick man and was confined to the hospital for a long period of time (T. 15). Immediately after his illness in September or October, 1931, Dr. Floria, because of his previous illness, desired to sever his connections with the bank as director and stockholder for the reason that he did not believe that

he could in justice to himself and to the bank carry out his duties as Director. He called to see Mr. Schiavone, the President, at his office in the bank in order to transfer his stock and be relieved of his duties as director (T. 16). Mr. Kaufmann was called from his adjoining office in the bank by Mr. Schiavone and was present when this conversation took place. Dr. Floria tendered his stock certificate to Mr. Schiavone who accepted it and requested Mr. Kaufmann to witness the signature of Dr. Floria to the assignment (T. 16). It was perfectly clear to Mr. Kaufmann that the intention of the parties was that the stock be transferred from Dr. Floria to Schiavone (T. 17 and 18) and he witnessed the signature of Dr. Floria to the assignment. He knew that the purpose of this transaction was to transfer the stock. Mr. Schiavone requested defendant to remain as a director until his term expired in December in order to keep a good face on the bank, and at the same time Schiavone accepted the certificate from defendant (T. 16). Kaufmann was present at the time these conversations took place (T. 16) and understood what was going on. At the time the transfer was made, the bank was solvent (T. 17) and nowhere in the record is there any indication that there was any bad faith surrounding the transaction. In accordance with the request of Mr. Schiavone that he remain as a director until the end of the year, Dr. Floria attended three directors meetings, the last one being December 10, 1931 (T. 14). The record does not show that defendant ever took any part in the conduct of the affairs of the bank after December 10, 1931. Shortly after the assignment, Mr. Schiavone died and the stock certificate was found among his papers (T. 16).

ARGUMENT.

I. The presumption of liability for an assessment on shares of stock in an insolvent bank arising from the presence of a person's name on the stock ledger is rebutted by evidence that the record owner has transferred his stock and has done all that a careful business man can be required to do to effect such transfer.

II. The facts show that, within the meaning of guiding federal cases, the defendant Floria did all that a reasonable, prudent business man was required to do when he transferred his stock to Schiavone.

III. It is not necessary that the shareholder in express language direct that the change be made on the books when the proper officers of the bank witness the transfer and fully understand from all the circumstances that they are to enter the transfer on the stock books.

IV. The defendant is not estopped to deny his liability by reason of the fact that he attended three directors' meetings at the request of the bank's officers when he was no longer a stockholder in the bank.

V. While the delivery of the stock might have been to the President as transferee, the bank had notice through him, and through the officer in charge of the transfer books that a change in ownership had taken place.

POINT I.

The Presumption of Liability for an Assessment on Shares of Stock in an Insolvent Bank Arising From the Presence of a Person's Name on the Stock Ledger is Rebutted by Evidence That the Record Owner Has Transferred His Stock and Has Done All That a Careful Business Man Can Be Required to do to Effect Such Transfer.

In the case of *Earle v. Carson*, 188 U. S. 42, 47 L. Ed. 373, affirming 107 Fed. 639, the defendant, prior to the assessment, sold her shares and delivered the stock to the proper officer of the bank for transfer with an adequate power of attorney to make the transfer accompanied by a request that the stock be transferred. The Court in 107 Fed. 639, at p. 640, said:

“Prima facie, therefore, she was liable for the assessment that was afterwards levied by the comptroller of the currency; but she met this apparent liability (successfully, as the verdict shows) by offering evidence at the trial to prove that on December 2d she had sold her shares in good faith ...and that she had done everything that was reasonably possible to procure a transfer of the shares on the books of the bank to the purchaser. Under several decisions of the federal courts, if the evidence established these facts, a complete defense was presented to the receiver's claim. (*Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. Rep. 61; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. Rep. 788; *Earle v. Coyle*, 38 C. C. A. 226, 97 Fed. 410; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571, 20 Sup. Ct. Rep. 419)”

In the case of *Matteson v. Dent*, 176 U. S. 521, the following is given as one of the exceptions to the general rule that the record owner is liable:

“Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the acts referred to will operate a transfer on the books, and extinguish the liability as stockholder of the transferrer. (*Whitney v. Butler*, 118 U. S. 655.) . . .

Other cases in accord are *Hayes v. Shoemaker*, 39 Fed. 319 and *Apsey v. Kimball*, 221 U. S. 514, 523, 31 S. Ct. 695.

POINT II.

The Facts Show That, Within the Meaning of the Adjudicated Cases, the Defendant Floria Did All That a Reasonable Prudent Business Man Was Required to do When He Transferred His Stock to Schiavone.

Almost a year before the levy of the assessment by the plaintiff in error, the defendant had disposed of his interest in the bank by the transfer and delivery of his certificates of stock to the president of the bank. The assignment was complete and nothing remained to be done except to make the formal transfer on the books of the corporation. Mr. Kaufmann, however, the officer who was called to witness the signature of the defendant to the assignment and who definitely knew that the stock was being transferred, failed to make the proper entry on the books of the corporation. The bank was solvent at the time of the transfer and the transfer was made in good faith and not to evade any possibility of subsequent liability. Dr. Floria had no reason to suspect that the transfer would not be made by Mr. Kaufmann, the Vice President and Cashier, who took part in the transaction, or would not be ordered to be made by the President to whom the stock

was transferred. Mr. Kaufmann did not have to wait for any further information before the entry could be recorded. He knew the name of the transferee and knew that the assignment was properly executed. For seven months before the assessment was levied the defendant had nothing to do with the affairs of the bank. He was not re-elected to serve as a Director after his stock had been transferred and he had no further connections with the bank.

There is abundant authority to show that on facts similar to these the Courts have held that the defendant has done all that was required of him to bar any recovery on an assessment of stock which he did not own but which, through neglect of the bank officers, remained in his name. The outstanding case supporting this rule is that of *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266. This case has never been overruled and is used as a guide in all similar cases on the subject. Because of its weight it is deemed best to set forth the facts and quote from it at length.

At the time the Receiver took possession of the Bank, two certificates for 50 shares each were in the name of Whitney on the books of the Pacific National Bank of Boston. The suit was brought against the executors of Whitney's estate. The by-laws provided that the stock should be assignable only on its books and that each certificate should state upon its face that the stock is transferable only on the books of the Bank. The defendants desired to sell the stock and placed the certificates in the hands of Day and Company, brokers. They also placed in their hands a power of attorney in the form usually adopted for transfers of stock. The stock was offered for sale at public auction and was bought by one Eager, who desired to buy

the stock through the Bank for one Coburn. The bank at which the broker did business refused to take Eager's check and Benyon, the President of the bank whose shares were being sold, substituted for it a cashier's check which cleared. Benyon was given the certificates and held them as security for the loan to Eager and also until he could procure further shares for Coburn. The executors of Whitney did not know by whom the stock was bought at the auction sale. Believing, in good faith, and having no reason to doubt that the purchaser had caused the transfer to be made, neither they nor the brokers took steps to ascertain whether it had in fact been done. While the bank did not purchase or intend to purchase the stock for itself, its president, in execution of Coburn's order, procured Eager to buy this stock with funds furnished him for that purpose.

After setting forth the general rule that the record owner of the stock is the party responsible upon an assessment which has been levied, the Court said:

“ . . . But it will be found, upon careful examination, (of cases cited by Receiver) that in no one of the cases in which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied . . . by a power of attorney, which would enable its officers to make the transfer on the register. The position of the seller, in such case, is analogous to that of a grantor of a deed deposited in the proper office to be recorded. The general rule is, that the deed is considered as recorded from the time of such deposit. . . . Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the prom-

ise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a transfer on the stock register.

“In the case before us the personal presence of the defendants at the bank was not required in order to secure their release from liability as shareholders. . . . Through their agents, . . . they surrendered the certificates and power of attorney to the president of the bank, he receiving them, with knowledge not only that defendants had parted with all title to the stock and had been paid for it, but, also, that it had been purchased at public auction by Eager. He knew equally well that the surrender of the certificates and the delivery of the power of attorney . . . could only have been for the purpose of having it appear, by means of a transfer on the books of the bank that Whitney’s executors were no longer shareholders. . . . They did all that was required by either as preliminary to such transfer. Nothing remained to be done except for some officer of the bank to make the necessary formal entries on its books. If, when the agents of the defendants delivered the certificates and power of attorney to the president of the bank, the latter had given any intimation of a purpose not to make the transfer promptly, or had avowed an intention to postpone action until a sufficient amount of stock was obtained to fill Coburn’s order, it may be that the failure of the defendants to take legal steps to compel a transfer would, in favor of the creditors of the bank, have been deemed a waiver of the right to an immediate transfer on the stock register. But no such intimation was given; no such

avowal was made. No objection was made to the power of attorney or to the discharge of the defendants from liability. So far as the record shows, nothing was said or done by the bank's officers to raise a doubt in the minds of the defendant's agents that the transfer would be made at once."

The facts in the case of *Snyder v. Foster*, 73 Fed. 136, 19 C. C. A. 406, are also very similar to those in the case before the Court.

In that case suit was brought by the Receiver against Snyder for \$5,000 alleged to be due on a stock assessment by virtue of the appearance of Snyder's name on the books. The evidence showed that Snyder borrowed \$5,000 from Collins, cashier of the bank to pay for 50 shares of stock; that he endorsed the certificates to Collins as security for the loan; that in order to pay Collins for the money borrowed he sold the certificates to Collins. The evidence further showed that the sale was made to Collins individually in the bank's office where Collins was the cashier and one of the directors; that no fraud was even intimated against Snyder and that all of his relations as stockholder and director in the bank ceased with said transaction; that the stock was transferable on the books of the bank. Whenever stock was to be transferred the certificate had to be returned for cancellation and a new certificate would be issued. The evidence showed no fraud on Collins' part; that the bank was solvent at the time of the alleged transfer and that Snyder ceased to be a director when Collins bought the stock. The evidence further showed that Snyder had no knowledge of the bank or any of its transactions after the sale to Collins.

The language of the Court is as follows:

“ . . . It was cashier Collins’ duty, in the bank’s interest, as well as in his own individual interest, he having become, in good faith, the vendee of the stock, and the certificate therefor having been left with him, either in his official or individual hands, at the time of the said sale to him, to make or cause to be made such a transfer thereof as should have been made on the bank’s books. . . .”

* * * * *

“ . . . But suppose, in a given case, A had sold his shares of stock in a bank to B, and the sale had taken place in the bank’s office, in the presence of the cashier, who at the time, to the knowledge of both A and B, had in his hands and kept A’s certificate, indorsed as it was over to B; then add to that supposition the further facts that at the time of the said transaction the bank was solvent, and remained so for five years thereafter, and that the cashier is dead, and the bank, five years after the sale to B, became insolvent, and the name of A is found in the books by the Receiver thereof remaining as a stockholder on the bank’s books—would such a state of case not fairly be controlled by the rule in the *Whitney v. Butler* case? . . .”

“ . . . What else could or should have been done by a prudent, careful, business man, under the state of facts in the pending case, to complete the honest efforts made by Snyder to cease to be, in fact, as well as in law, a shareholder in the said bank? In some respects the facts in this case are stronger for Snyder than for the executors of Whitney in the Whitney-Butler case. That decision did not turn on the form of authority to make the transfer. It seems to have been the purpose of the Court in that case to ground the opinion

largely, if not entirely, on the broad doctrine that a shareholder in good faith, who has done all that a prudent business man should do, will not be held responsible for the neglect and carelessness of an officer of the bank.”

Another Federal case, that of *Hayes v. Shoemaker*, 39 Federal 319, is worthy of consideration because of the similarity of its essential facts with those before the Court. The defendant’s agent was invested with full authority to sell the defendant’s stock in a national bank and met the purchaser of the stock at the bank. These parties informed the cashier that they came to make a legal transfer of the stock and the attorney endorsed the certificate, on the cashier’s request, and delivered it to him, together with the power of attorney, the cashier promising, but neglecting, to make proper entry in the books of the bank. After holding that the fact that the notice of sale and request to transfer were oral did not affect the case, the court said:

“The rule is a just one that a shareholder, after having done all that a prudent and careful business man should do, will not be held responsible for the neglect and carelessness of an officer of the bank. . . .

“An examination of this testimony has convinced the Court that the defendant, though he might, perhaps, have taken additional precautions, did all that the law, custom and common prudence required to relieve himself of liability.”

The facts surrounding the transfer of the stock by Dr. Floria to Schiavone are almost identical with those in the three cases cited above. In the Whitney case the President of the bank was given the certificates by

the agent of the seller with power of attorney to make the transfer. In the Snyder case the certificates were endorsed to Collins, the cashier. In the case of *Hayes v. Shoemaker* the cashier was given the power of attorney. The facts in our case are even stronger than in any of the above because both Mr. Kaufmann, the cashier, and Mr. Schiavone, the president, took part in the transfer and assignment of the shares—both the officer in charge of the stock book and the president of the bank. In the Whitney case, again, the president received the shares with knowledge that the seller had parted with his title and with knowledge of the name of the purchaser. In the Collins case, the cashier was the transferee himself, and the Court held that even though he received the stock in his individual capacity, still, his knowledge was the knowledge of the bank (to be subsequently pointed out by a quotation from the decision of the Court). And in the Shoemaker case the cashier was the recipient of the stock on behalf of the bank for the purpose of transfer. In our case, the assignment was complete, the president received the certificates and knew that he was becoming the owner of them, and certainly knew that the transfer had to be made on the books. Even if we assume that he had no knowledge in law, because he was receiving the stock in his individual capacity, still, the cashier and keeper of the stock ledger, was present and took part in the transaction and was well aware of the fact that a transfer had to be made. He knew what was taking place and it was his duty to make the proper entry on his books. Again, in the Whitney case, the seller had no reason to suspect that that president would not cause the transfer to be made. In the case before this Court, Dr. Floria had no reason to believe that Kauf-

mann would not make the transfer. Dr. Floria was justified in believing that the parties who took part in the transaction understood what was taking place and would do the necessary acts to effect the purpose of their meeting. They gave to him no "indication of a purpose not to make the transfer promptly." They made "no objection . . . to the (assignment) or to the discharge of the defendants from liability. . . . Nothing was said or done by the bank's officers to raise a doubt in the minds of the defendant . . . that the transfer would not be made at once." (*Whitney v. Butler, supra*) Dr. Floria did not have to make a specific request for the transfer. No prudent man would feel it necessary to do that under the circumstances. The Whitney case did not require it despite the language to the contrary used in the *Richmond v. Irons* case (121 U. S. 27, 30 L. Ed. 864). As in the Whitney case, nothing remained to be done except to have Mr. Kaufmann make the necessary formal entries on the books of the bank.

POINT III.

It Is Not Necessary That the Shareholder in Express Language Direct the Change to be Made on the Books of the Bank When the Proper Officers of the Bank Witness the Transfer and Fully Understand From All the Circumstances That They Are to Enter the Transfer on the Books.

The case of *Weakley v. McClarty*, 136 Ky. 837, 125 S. W. 265, was one in which a suit was brought against the defendant after he had disposed of his interest in the stock of the plaintiff bank. The Court found for the defendants, and among other things said that the

mere fact that the stockholders were selling their stock created a strong presumption that they wanted it transferred. Then the Court said this:

“ . . . The appellees simply indorsed their shares of stock by signing their names to the blank form of transfer and power of attorney to enter the same upon the books of the bank which was printed upon the backs of the shares. After this was done, the shares were turned over to the cashier of the bank, who was really the purchaser, but who was purporting to manage the purchase for others. The question involved is whether or not after the stockholders have in good faith sold their stock in a solvent corporation, indorsing it in blank as above stated, and then turning the shares over to the cashier of the bank, either with the actual or implied understanding that the officer would do what was necessary to effectuate a legal transfer of the stock on the books of the bank, he failed so to do, are the stockholders, after the expiration of two years from the date of the transaction, liable to the creditors of the bank, it being insolvent? . . . ”

“If he knew the intention and desire of the sellers that the stock was to be transferred, and failed to transfer it, then his failure was the failure of the bank, and the transfer must be regarded as having been made. . . .”

“ . . . *Nor is it necessary that an express request to the officer be shown in either case.* (Italics Supplied) If the facts show that a transfer in one case or a recording in the other was intended and understood, it is just as much a request as if the words were spoken. The Court cannot doubt that Hancock knew that these farmers and their wives wanted to sell their stock and get out of his bank. He well knew that they had no arrangement with

him or McClarty or anyone else to remain as ostensible stockholders. The transaction spoke for itself even if he had not so well understood it."

And the case of *Keyes v. Myhre*, 143 Minn. 193, 173 N. W. 422 contains similar language:

"...In the case at bar the sale of the stock was in good faith and for value paid at the time. The certificates were delivered to the purchaser, who happened to be the cashier of the bank, properly indorsed with a power of attorney authorizing a transfer on the bank books. The certificates so indorsed thereafter remained at the bank in a safety deposit box in which were kept papers and documents belonging to the bank and also papers and documents belonging to the cashier. The situation so continued for over three years, with no suggestion that any officer of the bank that a transfer was withheld for any reason; nor were defendants advised that a proper transfer had not been made, nor in any way thereafter treated as stockholders or as having any interest in the bank... *Although defendants made no specific demand that the cashier enter the transfer on the books, that fact should not be held to expose them to liability.* (Italics supplied.) It was the duty of the cashier to make the transfer and the situation presented no reasons suggestive to defendants that he would either neglect or refuse to perform the same. A formal request would have added nothing in protection of the rights of others, and the burden of the default of the cashier should not be cast upon them, for they are entirely innocent of any intentional omission of anything necessary to completely divest them of all evidence of title or ownership of the stock. The case cannot well be distinguished in point of substance from the Whitney case. *Richmond v. Irons* . . . is distinguishable in its facts."

It was understood by Kaufmann, Dr. Floria and Schiavone that the stock was being transferred to the latter. There was nothing said or done then or thereafter to excite the suspicion of Dr. Floria that the transfer would not be made on the books. It was implied from the facts surrounding the transfer that everything would be done that had to be done to effect the transfer.

It is not necessary to consider the case of *Price v. Whitney*, 28 Fed. 297, cited by plaintiff in error in his brief. That is the report of the *Whitney v. Butler* case in the lower court which was reversed on appeal. The names of one of the parties happen to be different due to the fact that on appeal Butler was substituted as party plaintiff for Price. The case of *Schofield v. Twining*, 127 Fed. 486, also cited by plaintiff in error is entirely different in its facts. The evidence in that case showed that no request was ever made to any officer of the bank to make a transfer nor did any officer know that the stock was to be transferred from defendant to his son. There never was any request made either expressly or by implication. "Moreover, there is not a particle of evidence in the case to show that the bank was solvent at the time the transfer took place." (*Schofield v. Twining, supra.*)

In the case of *Dellert v. Stallman*, 29 F. (2d) 236, the Court did not specifically require notice but said that there was the requisite notice in this case. The language used follows:

"Besides Heller, the assistant cashier and the president knew it was sent to the bank for sale, and the president knew of the receipt of the letter with the certificates of stock, properly endorsed for transfer, inclosed, so that the knowledge of what

was being done or was to be done was not confined to Heller, and the matter of notice rested upon fact, and not upon a presumption merely from knowledge had by Heller.”

The *Whitney v. Butler* case is certainly no authority for the proposition that specific notice must be given to the keeper of the stock register to have the transfer entered. Counsel have diligently read the opinion numerous times and can nowhere find such a statement in it despite the apparent statement to the contrary contained in the case of *Richmond v. Irons, supra*. On the contrary, from the language used in the *Whitney* case it would appear that, as in the case at bar, no specific request was made. The portion of the opinion in *Richmond v. Irons* dealing with the problem before us merely contains conclusions drawn from the facts which are not set forth in the opinion. It is interesting to note that in that case there was “. . . no proof, as there was in that case (*Whitney* case) of the delivery of the certificate to the bank and a power of attorney authorizing its transfer. . . .”

POINT IV.

The Defendant is Not Estopped to Deny His Liability by Reason of the Fact That He Attended Three Directors Meetings at the Request of the Bank Officers When He was No Longer a Stockholder in the Bank.

Counsel for the plaintiff in error have used the word “estoppel” in two senses in their brief. They say that because the stock remained on the books of the bank the defendant in error was estopped as against creditors (and the receiver) from denying that he was a

shareholder in the bank at the time it closed. They also use the word to cover the situation which found the defendant in error serving as a director after he had transferred his holdings and was no longer a stockholder. Since the by-laws of the corporation required that only stockholders could be directors, the plaintiff in error contends that because Dr. Floria acted as a director at three meetings after he had conveyed his stock then that estops him from now saying that he was not a stockholder and subject to this assessment.

With the first meaning attributed to the word we can have no quarrel. This language is used throughout the cases and is given as the reason why a stockholder can not avoid his statutory liability. But the doctrine of estoppel as so used is not inflexible. In the cases cited heretofore the defendant's name has appeared on the books of the bank and perhaps creditors have given credit to the bank in reliance upon the name of the defendant appearing therein, yet, even though such credit might have been given in reliance on the defendant being a stockholder, the Courts have universally held that the defendant cannot be held on a stock assessment where he has done all that a reasonable prudent man would be required to do to have such transfer made and this transfer is not in fact made. If in all cases where the defendant's name remains on the books we say that the defendant is estopped, then there would be no basis for such cases as the *Whitney v. Butler* case, the *Snyder v. Foster* case and the many others holding the same way. And this was the meaning of the word when used by the Courts in the cases cited by plaintiff in error (*Matteson v. Dent*, 176 U. S. 521; *Scott v. Deweese*, 181 U. S. 202, 213, and *Kenyon v. Fowler*, 155 Fed. 107, 108). The plaintiff in error says

that the creditors of the bank by referring to the stockholders ledger would have been advised that the defendant was a stockholder from the date of the acquisition of the stock and had never divested himself from ownership. The answer to that statement is that in every case where the defendant had done sufficient to bring himself within the meaning of the *Whitney v. Butler* case, if the creditors had looked at the stock book they would have found that the defendant was still the owner of stock. Yet the Courts have relieved the innocent stockholder from liability when the facts and circumstances were similar to those presented in the case before the Court.

The other conception of estoppel brought forward by plaintiff in error is that after Dr. Floria had transferred his shares he acted as a director and this was inconsistent with an assignment of his stock. Plaintiff in error in his brief says that Dr. Floria acted as a director as late as January, 1932. This is not the fact. The evidence in the record shows that the last meeting attended by Dr. Floria was on December 10, 1931. But Dr. Floria did not take part in any of the activities of the bank after that date. And it was not until July, 1932, seven months later, that the bank was closed. Had the creditors looked at the minutes of the directors' meetings in December, 1931 they would have found the same thing as would be discovered on an examination of the stock ledger. That is, that the defendant was apparently a stockholder. But as stated heretofore, this is not conclusive. Acting as director might have been inconsistent with his non-ownership of stock, but he did this at the specific request of the officers of the bank and only for approximately two months after the disposition of his stock. He might

have wrongfully attempted to act as a director but the cashier of the bank and the president of the bank knew that he was no longer qualified to act as a director. Dr. Floria did not intend to re-establish his connection with the bank as a shareholder but intended to satisfy the requests of Mr. Schiavone.

The case of *Logan v. Crissinger*, 290 F. 415, is no authority for the contention of the plaintiff in error on this point. Logan was the owner of stock and voted them a very short time before the close of the bank. He knew that his name was on the stock books and did nothing to relieve that situation. The facts in that case in no way indicated to him that his name would be removed. On the contrary, he had reason to believe that his name would remain on the books and he did nothing to remedy the situation. A cursory reading of the facts will show that they are not applicable to the present case. The bank didn't know who was the owner of the stock and the defendant did not do what a reasonable man should have done. It was for this reason that he was estopped, not that he voted the stock.

POINT V.

While the Delivery of the Stock Might Have Been to the President as Transferee, the Bank Had Notice Through Him, and Through the Officer in Charge of the Transfer Books That a Change in Ownership Had Taken Place.

Any reasonable interpretation of the facts in the present case would lead to only one conclusion, and that is, that the bank had notice of the transfer even though the stock were conveyed to Mr. Schiavone personally. Mr. Schiavone was the president of the bank.

Notice to him was notice to the bank. In the case of *Snyder v. Foster*, 73 Fed. 136, the same question arose. There the stock was transferred to the cashier personally and counsel for the plaintiff raised the proposition that if this were so, the bank had no notice of the transfer. In the instant case this is as unrealistic as it is bad law. The *Snyder* case had this to say:

“We think from the state of facts which are shown in the direct evidence, supplemented, as it may be, by deductions fairly drawn therefrom, the law will impute notice to the bank, and charge it with such knowledge of such transactions as its executive officer, Cashier Collins, and one of its directors, Collins, possessed, by reason of said sale and transfer of the said shares made to him as an individual; and that such a state of case will give rise to and be attended by a legal presumption in favor of *Snyder* that the bank, through its official, would do, or cause to be done, such acts in relation to the transfer of said shares as its executive officer was required to do in the premises.”

“ . . . The presumption of law just stated, it may be contended—and we are disposed to accede to the contention—would not apply in this case if its history should show that Collins, at the time the said transfer was made to him individually, had an interest in himself, as an individual, at all hostile to the interest of the bank. . . . There is no indication in the evidence that Collins had any such interest, and such an adverse interest in himself would not, under the evidence, be presumed.”

A reading of the case of *Richmond v. Irons* will very readily disclose that the interest of the president was in conflict with that of the bank. Where this is the case his knowledge can not be imputed to the bank.

The case of *Dellert v. Stallman*, 29 F. (2nd) 236, cited by plaintiff in error is directly in our favor. There the certificates were delivered to the cashier personally. Yet, if the contention of the plaintiff is correct the bank had no notice of the transfer due to the fact that the cashier was the personal owner of the shares.

“ . . . (Appellant) bases his first contention upon the proposition that, as the sale was a personal one to Heller, Heller's agreement to see to the transfer of the stock upon the books of the bank was an undertaking to do something in his individual capacity, and not as cashier, and he could not, therefore, represent the bank so as to make the bank chargeable with his knowledge or bound by his promise to make the transfer. . . . ”

Quoting from *Thompson on Corporations* the Court continues:

‘The general rule is well settled that an officer cannot act for the corporation in a matter in which he is personally interested, and hence can not bind the corporation by contracts made with other parties in which he has a personal interest, in cases where his own interest and the interests of the corporation may conflict.’

“We are of the opinion that this rule has no application here because we can see no possible theory, deducible from the record, upon which there could have been a conflict between Heller's interests and those of the bank, involved in the transfer of that stock upon the books.

But if we assume for the purpose of argument that the delivery was to the president personally and his knowledge was not the knowledge of the bank, then we still have the fact that the cashier in charge of the transfer books took part in the transaction which

transferred the stock. *He* was not receiving the stock individually. He had no personal interest in the transaction. *He* knew the transfer was being made. It was his duty to make the transfer on the books and if he failed to do it then his failure is the failure of the bank and the plaintiff should not be entitled to recover in this action.

CONCLUSION.

“It is of the utmost importance that the liability of stockholders of national banks should be rigorously enforced, but, on the other hand, the Court should not treat them with exceptional severity and apply to their transactions different rules from those which obtain in other business transactions.” (See *Snyder v. Foster*, 73 Fed. 136.)

LEWIS H. SHAPIRO,
MARK P. FRIEDLANDER,
ROBERT I. SILVERMAN,
Attorneys for Defendant in Error.

